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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 941

FRANK ANTHONY CARCERANO,

Petitioner,

v.

CLARENCE T. GLADDEN, Warden, Oregon State Penitentiary,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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JURISDICTION

Petitioner asserts that the jurisdiction of this Court is based upon U. S. Supreme Court Rule 19 (1)(a), 28 U.S.C.A. The respondent denies that such jurisdiction lies since the Oregon Supreme Court has decided no federal question. There is no federal constitutional right to compel a jury trial in a state court, much less to delineate any procedural matter therein beyond the basic requirement of due process. Due process having been ensured by the state guarantee of a fair and unbiased jury, the procedural manner in which the jury reached

its decision presents no federal question, absent a showing of individual prejudice or discrimination.

ARGUMENT

Petitioner was not denied due process by Art. I, § 11, of the Oregon Constitution, which provides for criminal conviction in non-capital cases by a determination of ten members of a twelve-man jury.

The petitioner attempts to connote the federal courts' requirement of a jury trial into a directive compelling a unanimous jury verdict in a state court proceeding. This ignores the initial incongruity of the lack of requirement of a jury in a state court. *Fay v. New York*, 332 U.S. 261, 288, 67 S.Ct. 1613, 91 L.ed. 2043 (1947); *Snyder v. Comm. of Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.ed. 674 (1934); *Maxwell v. Dow*, 176 U.S. 581, 602-603, 20 S. Ct. 494, 44 L.ed. 597 (1900).

The factors that govern the present case are best illustrated by *Fay v. New York*, supra, which held that to fall on constitutional grounds a conviction must result from a trial procedure so unfair as to take liberty without due process of law. *Fay* noted that:

> "* * * [I]t steadily has been ruled that the commandments of the Sixth and Seventh Amendments, which require jury trial in criminal and certain civil cases, are *not* picked up by the due process clause of the Fourteenth so as to become limitations on the states. 'This court has ruled that consistently with those amendments trial by jury *may be modified by a state or* abolished altogether.' *Palko v. Connecticut*,

302 US 319, 324, 58 S Ct 149, 82 L ed 288, and cases there cited . . ." (Emphasis supplied) *Fay v. New York*, supra, at 288.

This same case described what the function of the Court was regarding supervision of state juries:

> "The function of this federal Court under the Fourteenth Amendment in reference to state juries is not to prescribe procedures but is essentially to protect the integrity of the trial process by whatever method the state sees fit to employ . . ." *Id.* at 294.

It then becomes apparent that the standards of due process and equal protection are not whether a jury is unanimous, but that all possible defendants receive the same treatment and that this treatment, as far as juries are concerned, is the provision of an unbiased and impartial body to hear the defendant's case and rule thereon.

A recent Oregon case dealt slightly with this constitutional qualification for a jury verdict. *Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468, 17 L.ed.2d 420 (1966) was reversed because of a remark of the bailiff to a juror which indicated Parker's guilt. The State argued no prejudice since only ten members of the jury had to concur. In reversing, this Court did *not* strike the Oregon provision. The Court merely said that a defendant must be allowed *impartial consideration* by *all* jurors but it made no further reference to the internal trial procedures of the state court.

When *Fay* indicated that a jury procedure could be

modified as long as the resulting procedures were fair, it echoed *dicta* expressed in an earlier case of this Court,

> "In criminal cases due process of law is not denied by a state law which dispenses with a grand jury indictmeht and permits prosecution upon information, nor by a law which dispenses with the necessity of a jury of twelve, or unanimity in the verdict . . ." *Jordan v. Massachusetts*, 225 U.S. 167, 176, 32 S.Ct. 651, 56 L.ed 1038 (1912).

Respondent submits that these statements are still valid today and in consideration of the arguments presented above and those contained in respondent's memorandum to the lower court (Petitioner's Appendix B) that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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